

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:

PUBLIC SERVICE
COMMISSION

BALLARD RURAL TELEPHONE
COOPERATIVE CORPORATION, INC.

PSC CASE NO. 2004-00036

v.

JACKSON PURCHASE ENERGY CORPORATION

ANSWER

FIRST DEFENSE

1. The Defendant admits the statements and/or allegations contained in Sections 1 and 2 of the complaint.
2. The Defendant denies the statements and/or allegations contained in Section 3 of the complaint.
3. Sections 4 through 7 represent conclusions of law which Defendant is under no obligation to answer, except as otherwise stated herein.
4. The Defendant admits the statements and/or allegations contained in Sections 8 through 11 of the complaint.
5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and/or allegations contained in Section 12 of the complaint and, therefore, same are denied.
6. The Defendant admits the statements and/or allegations contained in Sections 13 through 16 of the complaint.
7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and/or allegations contained in Section 17 of the complaint and, therefore, same are denied.
8. The Defendant admits the statements and/or allegations contained in Sections 18 and 19 of the complaint.

9. The Defendant admits to providing the quotation cited from the February 2003 letter in Section 20, but denies the allegations, contained in the remainder of Section 20, that Defendant did not offer support for its price increase, though not necessarily of the type requested by the Complainant.
10. The Defendant admits the statements and/or allegations contained in Section 21 of the complaint.
11. The Defendant admits so much of Section 22 of the Complaint averring that an actual controversy exists between the parties, whereby the Complainant has seen fit to withdraw from negotiations regarding this matter, and that the failure of an agreement concerning pole attachments will necessitate removal of some attachments. All other statements and/or allegations contained therein are denied.
12. The Defendant admits so much of Section 23 of the Complaint averring that an actual controversy exists between the parties, whereby the Complainant has seen fit to withdraw from negotiations regarding this matter, and that the failure of an agreement concerning pole attachments will necessitate removal of some attachments. All other statements and/or allegations contained therein are denied.
13. Section 24 of the Complaint does not make an assertion for which a response is required.
14. The Defendant denies the statements and/or allegations contained in Section 25 of the complaint.
15. The Defendant denies the statements and/or allegations contained in Section 26 of the complaint.
16. The Defendant denies the statements and/or allegations contained in Section 27 of the complaint.
17. Section 28 of the Complaint does not make an assertion for which a response is required.
18. The Defendant admits the statements and/or allegations contained in Section 29 of the complaint.
19. Defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and/or allegations contained in Section 30 of the complaint and, therefore, same are denied.
20. The Defendant denies the statements and/or allegations contained in Section 31 of the complaint.

21. The Defendant denies the statements and/or allegations contained in Section 32 of the complaint.

SECOND DEFENSE

The complaint fails to state a claim against JPEC upon which relief can be granted therefore, the complaint should be dismissed with prejudice.

THIRD DEFENSE

The PSC lacks jurisdiction to hear this matter because it does not concern regulation of rates of a utility to a customer. Complainant relies upon *Kentucky CATV Association v. Volz*, Ky. App., 675 S.W.2d 393, 396 (1983) to establish that the Public Service Commission has the right to regulate pole attachment rates. The Court in *Volz* did indeed hold that cable television pole attachment rates are within the Commission's power to regulate, but that case dealt specifically with attachments for a utility that was deemed a customer of the utility owning the poles. The Commission has noted in Administrative Case 251, (relied upon by the Court in *Volz*), that cable operators were customers because they could not construct poles of their own. The Commission has never previously regulated pole attachment agreements between two utilities that each possess equal authority to develop pole systems.

FOURTH DEFENSE

The Defendant pleads affirmatively herein that its pole attachment rates are "fair, just and reasonable," and have not established a burden on the Complainant.

FIFTH DEFENSE

The Defendant pleads affirmatively herein that CATV pole attachment rates (otherwise known as tariffs) do not apply to telephone utilities which have the capacity to construct their

own poles. In a section of Administrative Case 251 titled "CATV Operators Are Not Joint Users," the Commission stated that:

CATV operators do not argue that they should be allowed to construct pole line systems of their own to share with the regulated utilities under typical joint use arrangements, and we see no reason why they should. Since they have no poles to "share," they need not be offered terms equivalent to those in prevailing joint use agreements between utilities both of which own and share poles. Under this doctrine pole attachments from joint use utilities, like electric and telephone services, should not be lumped together with cable television attachments for establishment of rates.

That Administrative Case established the current system of tariffs regarding cable television pole attachment rates, but has never been applied to relationships between telephone and electric utilities.

SIXTH DEFENSE

The Defendant pleads affirmatively herein that the "Filed Rate Doctrine" does not apply to the current situation which does not involve tariffs as noted above. Further the Defendant is unaware of any requirement by the Commission that joint use arrangements are required to be filed.

SEVENTH DEFENSE

The Defendant pleads affirmatively herein that the Complainant's request for a refund of all pole attachment charges since June 5, 1954 is unreasonable, and should be barred according to the doctrine of Estoppel, since damages would allow Complainant to benefit under an agreement for forty-nine years and then ask for a refund after the fact. In *Hicks v. Combs*, 223 S.W.2d 379, (1949), it was determined that a party cannot reap the benefits of a contract for a period of years and then question its validity after the fact.

Further, the Defendant also pleads affirmatively that the Complainant's request should be barred by the doctrine of laches, which "for the peace of society, requires and justifies the discouragement of attempted enforcement of stale demands, and frowns upon undue and unaccounted for and prejudicial delays in seeking relief." *Wisdom's Adm 'R v. Sims*, 144 S.W.2d 232 (1940). The Complainant has failed to properly bring this action after supposedly suffering for the past forty nine years.

Further it should be recognized that the joint use agreement between the parties established a mutual relationship of pole attachment, whereby both parties paid rates to the other for the use of poles.

WHEREFORE, having answered, the Defendant prays for the ruling of the Public Service Commission.

Respectfully submitted,

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By 
W. David Denton
Walter R. Luttrull, III

ATTORNEYS FOR JACKSON PURCHASE ENERGY
CORPORATION

I hereby certify that 10 copies
of the foregoing were filed with the
Public Service Commission by
mailing via U.S. Mail to:

MR. THOMAS DORMAN EXEC. DIR.
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P O BOX 615
FRANKFORT KY 40602

AND via facsimile transmission to:
Mr. Thomas Dorman, Executive Director,
Commission @ 502-564-3460

True and correct copies of the
foregoing have been mailed to:

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on this 8 day of March, 2004.


W. David Denton

CC: Kelly Nuckols,
Jackson Purchase Energy Corporation